



Insight

HHS Proposes to Sunset Its Regulations

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EXECUTIVE SUMMARY

- The Department of Health and Human Services (HHS) proposed a rule that would essentially force the department's agencies to review existing regulations every 10 years, or else the regulation in question would sunset, or expire.
- Each regulation (with some exceptions) would need to be reviewed to determine whether the regulation is achieving its desired outcome, or if should be rescinded or modified based on new information.
- Sunsetting is not a new idea, although a federal agency sunsetting its own rules on the scale proposed by HHS would be novel.
- The ultimate fate of the proposed rule depends on the outcome of the presidential election.

INTRODUCTION

The Department of Health and Human Services (HHS) proposed a novel [rule](#) that would require HHS and its agencies to review most of their regulations within 10 years. If such a review on a regulation does not occur over that time, the regulation would sunset, or expire.

The proposed rule, “Securing Updated and Necessary Statutory Evaluations Timely,” if finalized, would mark the first time a federal agency would add expiration dates to most of its regulations, essentially forcing the agency to conduct a review of each regulation to see if it is still needed or should be modified.

ELEMENTS OF THE PROPOSED RULE

Retrospective analysis is the concept of reviewing an existing regulation to assess whether the underlying regulatory goals were achieved, projected economic impacts were accurate, or if legal, technical, or economic circumstances have changed. At its core, the proposed rule would simply add an enforcement mechanism to incentivize HHS and its agencies to conduct retrospective analysis of its regulations in accordance with existing federal law and executive orders from every president since Jimmy Carter.

The Regulatory Flexibility Act (RFA) contains a [provision](#) that requires agencies to analyze their rules to “determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities.” Despite this requirement, agencies largely do not conduct reviews because there is no consequence for failing to do so. The same is true of the many executive orders on retrospective review issued by past presidents.

This proposed rule by HHS adds language to the department's underlying regulatory code saying that if a covered agency fails to conduct a retrospective assessment under the RFA within 10 years of a regulation being

issued or undergoing review, the regulation expires. It would then need to be repromulgated. This expiration should incentivize the agency to review all rules as required. Of note, HHS wants all of its regulations (with some exceptions) to be assessed to see if they require further review under the RFA, not just those assumed to have impacts on small businesses. This provision has the effect of making most of its regulations subject to a cursory review to determine if the projected effects of a regulation when promulgated were accurate, and it is an important step toward improving regulatory outcomes in an economically efficient manner.

In terms of its current stock of regulations, HHS would have two years to review regulations older than 10 years, and then subsequently start a rolling annual review of regulations approaching their expiration date. Using artificial intelligence technology, HHS scanned its existing regulations and found that 85 percent of those created before 1990 had not been edited. HHS anticipates it would review about 2,200 rules in the initial two years, and then about 125 regulations annually on an ongoing basis.

While a federal agency sunseting its own regulations on this scale would be unprecedented, the concept is not new. Over the past decade, legislation that would allow regulations to sunset has been floated in Congress, most notably the [Regulatory Sunset and Review Act](#). Some states, such as New Jersey and Indiana, have implemented a form of sunseting regulations. Other countries, such as the United Kingdom, France, and Germany, have some form as well.

OUTLOOK

Whether HHS's proposed sunseting rule ever goes into effect appears to hinge entirely on the outcome of the presidential election. If President Trump wins reelection, HHS would surely finalize this rule following feedback from a public comment period.

Should Joe Biden win, however, it is likely his new administration would withdraw the proposed rule. The Trump Administration's HHS may rush to try to finalize the rule before January 20, 2021, but with some components of the proposed rule subject to a 60-day comment period, finalizing it would require a lightning-fast turnaround. If finalized, this rule would also be subject to the Congressional Review Act (CRA). If repealed under the CRA, a future administration would not be able to issue a substantially similar rule, essentially killing the idea permanently. Of course, invoking the CRA to strike down this rule would require the assent of both houses of Congress and the signature of the president—a scenario unlikely in a divided Congress.